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No. 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PEOPLE OF THE STATE OF MICHIGAN,
ex rel GEORGE H. WINKLE,
Petitioner-Appellant,

v.

WILLIAM H. BANNAN, Warden of the State Prison
of Southern Michigan, Jackson, Michigan,
Respondent-Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF MICHIGAN

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS AND MOTION TO STRIKE

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On basis of the reasons and grounds, and arguments in support thereof, set-forth in Appellant's Jurisdictional Statement, pages 3-48, which are incorporated herein by reference, Appellant *denies* the contention of appellee that the [Fourth and] Fourteenth Amendment question of the validity of the provisos of the Michigan Constitutions, which are italicized in the quotations appearing on pages 15 and 16 of the said jurisdictional statement, is not in-

volved because, as appellee claims . . . "the search of appellant's automobile was reasonable and the evidence found as a result of the search was therefore properly allowed into evidence without reliance upon the provisions of this portion of the Michigan Constitution." (Which latter quoted proposition and claim appellant has also denied in its entirety in said jurisdictional statement)

Appellant believes, that in and by said jurisdictional statement, supra, he has in good faith seriously challenged, attacked and questioned the wisdom, propriety, correctness, validity, constitutionality, etc., in the Federal Constitutional sense, of the said Michigan Supreme Court opinion/decision, *People ex rel Winkle* v. *Bannan*, 372 Mich. 292, affirming his two state court convictions.

Appellant Winkle, was originally convicted on basis of the said Michigan Constitutional Search and Seizure exemtion Provisos and his convictions were upheld and affirmed by the Michigan Supreme Court in *People* v. *Winkle*, 358 Mich. 551, which held said Michigan Constitutional Proviso valid and constitutional. Before appellant was allowed to have such affirmance and said claimed validity and constitutionality, in the Federal Constitutional sense, reviewed and passed upon by the United States Supreme Court, the Michigan Supreme Court, on mandate from this Court, re-litigated and re-decided appellant's case, as though in trial de novo, and upheld the search and seizure on claimed non-federal grounds—presumably urging that a search and seizure could be found reasonable and legal on claimed non-federal and independent state grounds and law. By virture of *Mapp* v. *Ohio*, 367 U.S. 643, *Ker* v. *California*, 374 U.S. 23, *Preston* v. *United States*, 376 U.S. 364, and *Stoner* v. *California*, 376 U.S. 483, ke know, and it is now axiomatic,

that such a proposition is no longer true and freedom from invasion of privacy is now a federally protected and Federal Constitution Right.

The Fourth Amendment to the Constitution of the United States guarantees as follows:

> *"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."*

The Michigan Constitutional Exemption proviso, Article II, Section 10, under which the search and seizure herein was upheld—adds on to the 4th Amendment's provisions set-forth above in the following far-reaching and sweeping terms, to wit:

> *"... Provided however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any narcotic drug or drugs, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slingshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or things, seized by any peace officer outside the curtilage of any dwelling house in this state."*

By its terms the aforesaid Michigan Constitutional proviso is repugnant to, in conflict with and in derogation of the terms/guarantees of the Fourth Amendment of the Federal Constitution above.

By virtue of the decision in People ex rel *Winkle* v.

Bannan, supra, (372 Mich. 292), which appellant brings here on appeal, the said Michigan Constitutional search and seizure exemption proviso is in full force and effect in Michigan, still to be used and enforced, although in conflict with the Federal Constitution and laws.

Appellant's appeal herein does present a substantial and important Federal question. The question is of vital and national importance because if this Honorable Court does not now take jurisdiction of this appeal and decide the constitutional validity of the said Michigan Constitutional search and seizure exemption provisos here under attack, every other state in the union will have the opportunity, and will be free, to either amend their own state constitutions or to enact statutes containing search and seizure exemption provisions of like terms, meaning or import as those presently in full force and in effect in Michigan—which are in conflict with the 4th Amendment of the Federal Constitution. The meaning, intent, command, etc., of *Mapp* v. *Ohio*, supra, could and would thereby be seriously thwarted, impaired and even nullified for a considerable period of time.

Assuming, without admitting, that the Michigan Constitutional Provisos under attack herein are not involved as appellee claims (appellant seriously disputes this), the question of the validity and reasonableness of the search and seizure herein made is not precluded or immune from appeal to and review thereof by this court. There are no longer any independent non-federal grounds upon which to hold searches and seizures valid, reasonable and constitutional. See *Mapp* v. *Ohio*, *Ker* v. *California*, and *Stoner* v. *United States*, *Preston* v. *United States*, supra.

In addition to the above, this appeal herein may also present serious and substantial federal questions as to the

existence or non-existence of probable cause to make the arrest and/or searches and seizures herein complained of as well as of the validity and reasonableness of same in the Federal Constitutional sense.

In view of the "arresting officers" testimony that the searches and seizures herein were made as a matter of routine and departmental policy and the ruling/opinion/verdict of the trial judge that before the trunk of appellant's car was unlocked by the officers they had no reasonable grounds to believe that a felony had been or was being committed in their presence by appellant (Jurisdictional Statement, Appendix, AA-1 through AA-7 and A-1 through A-3) the time of the arrest, the belief and action taken thereon at the time of the searches and seizures, the officers later testimony relative thereto and the trial court's finding/determination/ruling thereon becomes (and should be) controlling—not the decision of the Michigan Supreme Court some seven years later stretching and inferring incidents/circumstances in order to achieve a strained finding of probable cause. *Ker* v. *California*, supra, held at pages 31 and 32 that:

> "... [r]easonableness in the first instance for the [trial court] ... to determine." etc.

In the above regard, it becomes very important to determine when the arrest occurred.

> "If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make the arrest lawful, or justify a search as its incident." *United States* v. *DiRe*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S 10; *Miller* v. *United States*, 357 U.S. 301; *Henry* v. *United States*, 361 U.S. 98.

> "The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night." *Rios* v. *United States*, 1960, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688.

The Michigan Supreme Court in its recent decision of Winkle's Appeal herein, 372 Mich. 292, held, among other things, that Winkle was under arrest the moment that the officers honked their horn and compelled him to stop for the alleged traffic violation. The officers themselves testified, that they considered Winkle under arrest at that moment. (See Trial Transcript, page 90; Joint Appendix 78a)

The determination then, of whether or not probable cause existed for Winkle's arrest for the felonies of Possession of Burglar Tools and Carrying a Concealed Weapon must be made as of the time of the initial stopping of his car and should not and cannot be made, determined and based upon the results of the subsequent interrogation made of Winkle and the passenger by the arresting officers—which latter proposition appellee urges upon this Court in the positive sense in his Motion to Dismiss.

The very graphic and dramatic presentation of the alleged conflicting testimony given to the officers by Winkle and the passenger (Casteel) *after* they were stopped and "arrested" is an after-the-fact (of arrest) attempt by appellee to establish probable cause and should be disregarded by this Honorable Court. Moreover, the alleged statements of the passenger (Casteel), allegedly made to one of the officers was not allowed into evidence at trial of the cause because not made in the presence or within the hearing of appellant Winkle. (See Trial Transcript, pages

17 and 18; Joint Appendix 23a and 24a) Appellee shows poor taste in setting forth this testimony, allegedly given at a preliminary examination, but excluded at trial, and is attempting thereby to prejudice the cause of appellant herein. Appellant moves to strike said alleged testimony of Philbrick alias Casteel (7a) set-forth in appellee's Motion to Dismiss, at page 5 and Appendix 6a and 7a.

In appellant's case herein, he was allegedly arrested for a minor traffic violation. At that point, it is amply stated on the record, the "arresting" officers had no probable cause or reason to believe that Winkle and the passenger had committed a felony or were committing a felony in their presence. At that point under the *Preston* v. *United States,* supra, there was nothing to search for as an incident to the "arrest" for a traffic violation and no incidental search under the facts and circumstances of the case was allowed. The subsequent opening of Winkle's automobile trunk was unauthorized and without consent and the search for articles therein was unreasonable in the Federal Constitutional sense. There was further violation of the terms of the *Preston* v. *U.S.,* supra, decision, in that upon opening the trunk, the officer merely saw a drill and one or two crowbars. The officers then and there seized nothing. (See Trial Transcript, pages 20, 75; Joint Appendix 26a, 67a). After appellant and passenger were handcuffed and in custody, the car was subsequently towed to the Blissfield Michigan State Police Post, many miles away, where the car and suitcases were more thoroughly searched and stripped and the bulk of the items, including the gun, listed in the opinion, 372 Mich. 292, and allowed into evidence, were searched for and seized without a search warrant. This latter search and seizure was too remote as to time and place of the original arrest and the seizure of articles thereby was clearly un-

reasonable and unconstitutional under *Preston*, supra; and should now be suppressed. (See Trial Transcript, pages 21, 80; Joint Appendix 26a, 30a, 56a)

Appellant does not concede that the questioning of appellant and passenger, under the facts and circumstances of the case, was either lawful (authorized by law) or based upon probable cause (See Jurisdictional Statement, Appendix AA-1 through AA-7 and A-1 through A-3) but was made as matter of routine and departmental policy. The case of *People* v. *Simon*, 45 Cal. (2d) 645, cited by appellee, in support of such routine questioning is certainly not the law followed by the several states, differs vastly on basis of facts of the case and would certainly be a dangerous law if adopted by this Honorable Court. If adopted it would sweep and wipe away all that the *Mapp*, *Ker* and *Preston* cases, supra, have bestowed upon us and safeguarded. *People* v. *Simon*, supra, is certainly and also not in accord with *Rios* v. *United States*, supra, nor with *United States* v. *DiRe*, *Johnson* v. *United States*, *Miller* v. *United States* and *Henry* v. *United States*, supra.

Other states have frowned upon and denounced the propositions laid-down in *People* v. *Simon*, supra. The very recent Wisconsin case of *Barnes* v. *State*, (Oct. 1964) 130 N.W. 2d 264, involving Searches and Seizures of automobiles, is a case in which defendant was stopped and arrested for a traffic violation and one of the officers then informed defendant that the "violation" justified a search of his person and car. Defendant state, "Go ahead. I am clean." The search of the car revealed no incriminating evidence but defendant was "patted down" for weapons and then one of the officers searched his person by aid of a flashlight. The beam of light was directed into defendant's right hand

overcoat pocket which disclosed a small quantity of green weed particles, later identified as marijuana, and a package of gummed cigarette papers. As a result of finding the marijuana defendant was arrested for possession of narcotics and taken to the police station and booked. He was also issued a traffic summons for the brakelight violation. The trial court denied the motion to suppress the marijuana without opinion. Defendant waived jury and was tried by the court. During trial defendant objected to the admission of the evidence revealed by the search of his person on the same ground as urged on the motion to suppress, but this objection was overruled. Defendant was found guilty and appealed. The Wisconsin Supreme Court held at page 269 in reversing the conviction:

> "However, all searches by police officers are subject to the requirement of reasonableness. This is implicit in the wording of both sec. 11, art. I, Wis. Const. and the Fourth Amendment . . .
>
> "We reject the State's contention that any search of the person of one lawfully arrested is a valid search. Such search to be reasonable must be limited to weapons or the fruits or instrumentalities of the crime for which the defendant was arrested. *Agnello* v. *United States, supra,* 269 U.S. at page 30, 46 S. Ct. 4. Here there could be no fruits of the misdemeanor of driving with a non-operating brakelight . . .
>
> "While defendant conceded the lawfulness of the arrest, we deem it advisable to add the observation that the type of search here conducted raises a strong suspicion that the original arrest for the minor traffic offense committed was but a pretext to search defendant for narcotics. Cf. *Taglavore* v. *United States* (9th Cir. 1961), 291 F. 2d 262, 265. As the United States Supreme Court declared in *United States* v. *Lefkowitz* (1932), 285 U.S. 452, 467, 52 S. Ct. 420,

424, 76 L. Ed. 877. 'An arrest may not be used as a pretext to search for evidence.' "

In *Barnes* v. *State*, at page 268, the Wisconsin Supreme Court further discusses the question of such contemporaneous searches and denounces and attacks, as being unsound law, the case of *People* v. *Gonzalas*, 356 Mich. 247, cited by appellee in his motion to dismiss, page 8, and rendered by the Michigan Supreme Court to sustain the validity/constitutionality of Michigan's Constitutional Search and Seizure Exemptions Provisos here under attack and used by said court to sustain appellant's convictions in both of his State Court Appeals herein (372 Mich. 292 and 358 Mich. 551) and which case (Gonzalas) is invariably and forever relied upon by the Michigan Supreme Court to sustain validity and reasonableness, in the federal constitutional sense, of such arrests, searches and seizures as in appellant's case herein and as herein complained of.

As noted, the Wisconsin Supreme Court in *Barnes* v. *State*, supra, stated at page 268 that:

> "The view that not every case of a lawful arrest for a traffic violation justifies a search of the person of the defendant for weapons finds support in these articles and comments in law reviews: Simeone, Search and Seizure Incident to Traffic Violations, 6 St. Louis University Law Journal (1961) 506; Note, Search and Seizure—Search Incident to Arrest for Traffic Violation, 1959 Wisconsin Law Review, 347; Note, Search and Seizure Incident to Traffic Violations, 14 Hastings Law Journal (1963) 459. A contrary view is expressed in Agata, Searches and Seizures Incident to Traffic Violations —A Reply to Professor Simeone, 7 St. Louis University Law Journal (1962) 1. The Gonzalas Case is

criticized as unsound in, Limitation on Expanding Scope of Legality of Searches and Seizures in Michigan, 9 Buffalo Law Review (1960) 382."

The *Barnes* v. *State* case, quoted at length supra, is certainly more sound and rational in the Federal Constitutional sense in pertaining to the reasonableness of searches and seizures of automobiles made contemporaneously with traffic violations than is the case of *People* v. *Simon*, supra, cited by appellee in his motion to dismiss. *Barnes* v. *State*, supra, is also in point on the facts whereas the Simon case is not. *Barnes* v. *State*, most certainly should be used by this Court in determining appellant's case herein and the substantial federal questions raised herein.

The remaining cases cited by appellee in his Motion to Dismiss, at pages 9-11, namely *Christensen* v. *United States*, 259 F (2d) 192, 193, *People* v. *Watkins*, 19 Ill. (2d) 11, 10, and *People* v. *Blodgett*, 46 Cal. (2d) 114, are certainly not in point on the facts with Winkle's case herein. Most of the cases cited by appellee, whether Federal or State, follow the same reasoning, logic and legal premises set-forth in *People* v. *Watkins*, (166 N.E. 433), supra, cited by appellee, and have required in addition to the traffic violation—something and essentially more by way of Probable Cause before a search and seizure could be found to be legal/reasonable; invariably requiring (1) a showing that consent was freely/voluntarily given and made to the search and seizure, (2) reliable/trustworty information by a known informant that motorist was involved in criminal activity prior to stopping for the alleged violation, or prior knowledge by the police to that effect, (3) sufficient "tailing" or observance of suspected motorist to supply/give more than mere suspicion he had been involved in criminal activities before being

stopped, (4) stopping motorist and arresting him for a misdemeanor or felony other than the traffic violation, etc.

The main case cited by appellee in his Motion to Dismiss at page 9, being *People* v. *Watkins*, supra, recognizes that a minor traffic offense that merely results in issuance of a summons—does not authorize contemporaneous search and seizure, stating at p. 437; (See also p. 438)

> "Such an offense does not, in itself, raise the kind of inferences which justify searches in other cases. Some traffic violations would justify a search. The total absence of license plates . . . as could obscured license plates upon a car being driven in the early morning hours . . ."

Aside from the substantial federal constitutional questions raised by appellant concerning the challenged validity of the Michigan Constitutional Search and Seizure provisos, the search of and seizure of articles from appellant's automobile made under the facts and circumstances herein was clearly unreasonable, and made without probable cause therefor, in the federal constitutional sense, and appellant was denied due process of law under the 4th and 14th Amendments of the Federal Constitution.

CONCLUSION

Appellant urges that his Jurisdictional Statement presents substantial important federal constitutional questions with adequate and substantial reasons, grounds and authorities set-forth therein to allow and require this Honorable Court to take jurisdiction of appellant's cause herein for purposes of review and granting of relief in manner and kind therein requested.

We respectfully urge that appellee's Motion to Dismiss should be denied in its entirety, with costs and attorney fees to appellant; That further, appellant's Motion to Strike, as embodied herein, should also be granted.

Respectfully submitted,

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